	Case 3:11-cv-01285-WQH -RBB Docume	ent 1 Filed 06/10/11 Page 1 of 13				
1 2 3 4 5 6 7 8		ES DISTRICT COURT				
10	SOUTHERN DISTRICT OF CALIFORNIA					
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12	ESET, LLC,					
13	Loci, Lic,					
14	Plaintiff,	CASE NO. '11CV1285 WQHRBB				
15	V.	COMPLAINT FOR				
16	LODSYS, LLC,	DECLARATORY JUDGMENT				
17	Defendant.					
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20	Plaintiff ESET_LLC ("ESET") hereby	valleges for its Complaint for Declaratory Judgment				
21	Plaintiff ESET, LLC ("ESET") hereby alleges for its Complaint for Declaratory Judgment					
22	against Defendant Lodsys, LLC ("Defendant") as follows:					
23	NATURE OF THE ACTION					
24	1. This is an action for a declaratory judgment that ESET does not infringe any valid					
25	claim of United States Patent Nos. 5,999,908 ("the '908 patent"), 7,133,834 ("the '834 patent"),					
26	7,222,078 ("the '078 patent") or 7,620,565 ("the '565 patent") (collectively, the "Asserted					
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28	SDI-93921v1	-1- COMPLAINT				
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Patents"), and for a declaratory judgment that the claims of each of the Asserted patent are invalid.

- 2. A true and correct copy of the '908 patent is attached hereto as Exhibit A.
- 3. A true and correct copy of the '834 patent is attached hereto as Exhibit B.
- 4. A true and correct copy of the '078 patent is attached hereto as Exhibit C.
- 5. A true and correct copy of the '565 patent is attached hereto as Exhibit D.

THE PARTIES

- 6. Plaintiff ESET is a California Limited Liability Corporation having a place of business at 610 W Ash Street, Suite 1900, San Diego, California 92101.
- 7. On information and belief, Lodsys is a Texas limited liability company having a place of business at 505 East Travis Street, Suite 207, Marshall, Texas 75670.

JURISDICTION AND VENUE

- 8. This action arises under the Patent Laws of the United States, Title 35, United States Code 35 U.S.C. § 1, et seq., and under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a), 2201 and 2202.
- 9. This action is filed to resolve an actual and justiciable controversy between the parties hereto. Defendant's conduct towards ESET establishes that a real and substantial dispute exists between the parties regarding Defendant's allegations that ESET's products infringe the '908 patent, the '834 patent, the '078 patent and/or the '565 patent. This dispute is both definite and concrete and admits of specific relief through a decree of a conclusive character. As set forth in succeeding paragraphs herein, there is a conflict of asserted rights among the parties and an actual controversy exists between ESET and the Defendant with respect to the infringement, validity and scope of the '908 patent, the '834 patent, the '078 patent and the '565 patent.

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- 10. Upon information and belief, this Court has personal jurisdiction over Lodsys because Lodsys has purposefully availed itself of the benefits and protections of the laws of this State, including this Judicial District, in connection with its conduct in wrongfully asserting the Asserted Patents against ESET, and in pursuing licensing and enforcement activities regarding the Asserted Patents throughout California.
 - 11. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and/or 1400.

ALLEGATIONS SUPPORTING DECLARATORY JUDGMENT JURISDICTION

- 12. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-11.
- 13. Through communications and conduct, Defendant has repeatedly threatened assertion of the '908 patent, the '834 patent, the '078 patent and/or the '565 patent against ESET's NOD32 Antivirus 4 product.
- 14. On or about March 28, 2011, Defendant sent a letter to ESET alleging that ESET "is infringing at least claim 1 of US 7,620,565 and claim 1 of US 7,222,078 as it relates to your provision of notice of available product updates and assisting in the download and installation of those updates with respect to your ESET NOD32 Antivirus 4." The March 28, 2011 letter also offered a license to ESET under "the Lodsys Patents," which was defined as including the '908 patent, the '834 patent, the '078 patent and the '565 patent. A copy of the March 28, 2011 letter is included as attached Exhibit E.
- 15. On June 7, 2011, Defendant sent ESET an e-mail message enclosing an "Infringement Claim Chart" in which Defendant alleged that ESET's Smart Security 4 product infringed claim 1 of the '078 patent. Defendant's message enclosing the claim chart stated that Defendant's goal was "resolving this issue with a minimum of expense and hassle for your

client." A copy of the June 7, 2011 e-mail and "Infringement Claim Chart" are included in the attached Exhibit F.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment of Non-infringement of the '908 patent)

- 16. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-15.
- 17. Based on the above-stated conduct, ESET is informed and believes, and on that basis avers, the Defendant contends that ESET's NOD32 Antivirus and Smart Security 4 products infringe one or more claims of the '908 patent.
- 18. Accordingly, an actual controversy exists between ESET and the Defendant as to whether or not ESET has infringed, or is infringing the '908 patent; has contributed to infringement, or is contributing to infringement of the '908 patent; and has induced infringement, or is inducing infringement of the '908 patent.
- 19. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., ESET is entitled to a declaration, in the form of a judgment, that by its activities ESET has not infringed and is not infringing any valid and enforceable claim of the '908 patent; has not contributed to infringement and is not contributing to infringement of the '908 patent; and/or has not induced infringement and is not inducing infringement of the '908 patent. Such a determination and declaration is necessary and appropriate at this time.

SECOND CLAIM FOR RELIEF

(Declaratory Judgment of Non-infringement of the '834 patent)

20. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-19.

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- 21. Based on the above-stated conduct, ESET is informed and believes, and on that basis avers, the Defendant contends that ESET's NOD32 Antivirus and Smart Security 4 products infringe one or more claims of the '834 patent.
- 22. Accordingly, an actual controversy exists between ESET and the Defendant as to whether or not ESET has infringed, or is infringing the '834 patent; has contributed to infringement, or is contributing to infringement of the '834 patent; and has induced infringement, or is inducing infringement of the '834 patent.
- 23. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., ESET is entitled to a declaration, in the form of a judgment, that by its activities ESET has not infringed and is not infringing any valid and enforceable claim of the '834 patent; has not contributed to infringement and is not contributing to infringement of the '834 patent; and/or has not induced infringement and is not inducing infringement of the '834 patent. Such a determination and declaration is necessary and appropriate at this time.

THIRD CLAIM FOR RELIEF

(Declaratory Judgment of Non-infringement of the '078 patent)

- 24. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-23.
- 25. Based on the above-stated conduct, ESET is informed and believes, and on that basis avers, that the Defendant contends that ESET's NOD32 Antivirus and Smart Security 4 products infringe one or more claims of the '078 patent.
- 26. Accordingly, an actual controversy exists between ESET and the Defendant as to whether or not ESET has infringed, or is infringing the '078 patent; has contributed to infringement, or is contributing to infringement of the '078 patent; and has induced infringement, or is inducing infringement of the '078 patent.

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27. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., ESET is entitled to a declaration, in the form of a judgment, that by its activities ESET has not infringed and is not infringing any valid and enforceable claim of the '078 patent; has not contributed to infringement and is not contributing to infringement of the '078 patent; and/or has not induced infringement and is not inducing infringement of the '078 patent. Such a determination and declaration is necessary and appropriate at this time.

FOURTH CLAIM FOR RELIEF

(Declaratory Judgment of Non-infringement of the '565 patent)

- 28. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-27.
- 29. Based on the above-stated conduct, ESET is informed and believes, and on that basis avers, that the Defendant contends that ESET's NOD32 Antivirus and Smart Security 4 products infringe one or more claims of the '565 patent.
- 30. Accordingly, an actual controversy exists between ESET and the Defendant as to whether or not ESET has infringed, or is infringing the '565 patent; has contributed to infringement, or is contributing to infringement of the '565 patent; and has induced infringement, or is inducing infringement of the '565 patent.
- 31. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., ESET is entitled to a declaration, in the form of a judgment, that by its activities ESET has not infringed and is not infringing any valid and enforceable claim of the '565 patent; has not contributed to infringement and is not contributing to infringement of the '565 patent; and has not induced infringement and is not inducing infringement of the '565 patent. Such a determination and declaration is necessary and appropriate at this time.

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FIFTH CLAIM FOR RELIEF

(Declaratory Judgment of Invalidity of the '908 patent)

- 32. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-31.
- 33. Based on the above-stated conduct, ESET is informed and believes, and on that basis avers, that the Defendant contends that ESET infringes one or more claims of the '908 patent.
- 34. ESET denies that it infringes any valid and enforceable claim of the '908 patent, and avers that the assertions of infringement cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.
- 35. Accordingly, an actual controversy exists between ESET and the Defendant as to the validity of the '908 patent. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., ESET is entitled to a declaration, in the form of a judgment, that the '908 patent is invalid. Such a determination and declaration is necessary and appropriate at this time.

SIXTH CLAIM FOR RELIEF

(Declaratory Judgment of Invalidity of the '834 patent)

- 36. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-35.
- 37. Based on the above-stated conduct, ESET is informed and believes, and on that basis avers, that the Defendant contends that ESET infringes one or more claims of the '834 patent.

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- 38. ESET denies that it infringes any valid and enforceable claim of the '834 patent, and avers that the assertions of infringement cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.
- 39. Accordingly, an actual controversy exists between ESET and the Defendant as to the validity of the '834 patent. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., ESET is entitled to a declaration, in the form of a judgment, that the '834 patent is invalid. Such a determination and declaration is necessary and appropriate at this time.

SEVENTH CLAIM FOR RELIEF

(Declaratory Judgment of Invalidity of the '078 patent)

- 40. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-39.
- 41. Based on the above-stated conduct, ESET is informed and believes, and on that basis avers, that the Defendant contends that ESET infringes one or more claims of the '078 patent.
- 42. ESET denies that it infringes any valid and enforceable claim of the '078 patent, and avers that the assertions of infringement cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.
- 43. Accordingly, an actual controversy exists between ESET and the Defendant as to the validity of the '078 patent. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., ESET is entitled to a declaration, in the form of a

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judgment, that the '078 patent is invalid. Such a determination and declaration is necessary and appropriate at this time.

EIGHTH CLAIM FOR RELIEF

(Declaratory Judgment of Invalidity of the '565 patent)

- 44. ESET realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-43.
- 45. Based on the above-stated conduct, ESET is informed and believes, and on that basis avers, that the Defendant contends that ESET infringes one or more claims of the '565 patent.
- 46. ESET denies that it infringes any valid and enforceable claim of the '565 patent, and avers that the assertions of infringement cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.
- 47. Accordingly, an actual controversy exists between ESET and the Defendant as to the validity of the '565 patent. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., ESET is entitled to a declaration, in the form of a judgment, that the '565 patent is invalid. Such a determination and declaration is necessary and appropriate at this time.

PRAYER FOR RELIEF

WHEREFORE, plaintiff ESET prays for a judgment as follows:

- 1. For a declaration that its products do not infringe any valid claim of the '908 patent;
- 2. For a declaration that assertions of infringement of the '908 patent cannot be maintained consistently with statutory conditions of patentability and the statutory requirements

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for disclosure and claiming that must be satisfied for patent validity under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;

- 3. For a declaration that the claims of the '908 patent are invalid under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- 4. For a declaration that its products do not infringe any valid claim of the '834 patent;
- 5. For a declaration that assertions of infringement of the '834 patent cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- 6. For a declaration that the claims of the '834 patent are invalid under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- 7. For a declaration that its products do not infringe any valid claim of the '078 patent;
- 8. For a declaration that assertions of infringement of the '078 patent cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- 9. For a declaration that the claims of the '078 patent are invalid under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- 10. For a declaration that its products do not infringe any valid claim of the '565 patent;
- 11. For a declaration that assertions of infringement of the '565 patent cannot be maintained consistently with statutory conditions of patentability and the statutory requirements

for disclosure and claiming that must be satisfied for patent validity under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;

- 12. For a declaration that the claims of the '565 patent are invalid under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- 13. For a preliminary and permanent injunction enjoining and restraining Defendant and its respective officers, partners, employees, agents, parents, subsidiaries or anyone in privity with them, and all persons acting in concert with them and each of them:
 - a. from making any claims to any person or entity that any product of ESET infringes the '908 patent, the '834 patent, the '078 patent and/or the '565 patent;
 - b. from interfering with, or threatening to interfere with the manufacture, sale, or use of any ESET's products by ESET, its customers, distributors, predecessors, successors or assigns; and
 - c. from instituting or prosecuting any lawsuit or proceeding, placing in issue the right of ESET, its customers, distributors, predecessors, successors or assigns, to make, use or sell products which allegedly infringe the '908 patent, the '834 patent, the '078 patent and/or the '565 patent.
- 14. For an award to ESET of its reasonable attorneys' fees and costs of suit incurred herein; and
 - 15. For such other and further relief as the Court may deem proper.

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1		JURY DEMAND						
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SJS 44 (Rev. 11/04)

Case 3:11-cv-01285-WQH_RBB COVER SHEET 06/10/11 Page 13 of 13

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

the civil docket sheet. (SEE IN	STRUCTIONS ON THE REVERSE OF THE FORM.)							
I. (a) PLAINTIFFS			DEFENDANTS					
ESET, LLC			LODSYS, LLC					
LSL1, LLC			LODS 13, LLC					
(h) c	of First Listed Plaintiff San Diego, CA			051	Harrison, TX			
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(c) Attorney's (Firm Name,	Address, and Telephone Number)		Attorneys (If Known)	11671	285 WQHRBB			
Nicola A. Pisano.	IONES DAY		Kelley, Donion, Gill, Huck & Goldfarb LLC					
	Real, Ste. 200, San Diego, CA 92130		701 Fifth Avenue, Suite 6800, Seattle, WA 98104					
	ICTION (Place an "X" in One Box Only)	ш с						
II. DASIS OF JURISD	(Place an "X" in One Box Only)		(For Diversity Cases Only)	KINCIPAL PARTIES	(Place an "X" in One Box for Plaintiff and One Box for Defendant)			
☐ 1 U.S. Government	■ 3 Federal Question		PT	TF DEF	PTF DEF			
Plaintiff	(U.S. Government Not a Party)	Citize	en of This State	1				
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2 U.S. Government	- 1 → Diversity -yeb	Citize	en of Another State	2				
Defendant	(Indicate Citizenship of Parties in Item III)			of Business In A				
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IV. NATURE OF SUIT	(Place an "X" in One Box Only)							
CONTRACT	TORTS	FOR	FEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES			
110 Insurance	PERSONAL INJURY PERSONAL INJUR		10 Agriculture	☐ 422 Appeal 28 USC 158	400 State Reapportionment			
120 Marine	☐ 310 Airplane ☐ 362 Personal Injury -		20 Other Food & Drug	423 Withdrawal	☐ 410 Antitrust☐ 430 Banks and Banking			
☐ 130 Miller Act ☐ 140 Negotiable Instrument	☐ 315 Airplane Product Liability Med. Malpractice Med. Malpractice ☐ 365 Personal Injury		of Property 21 USC 881	28 USC 157	450 Commerce			
☐ 150 Recovery of Overpayment	☐ 320 Assault, Libel & Product Liability		30 Liquor Laws	PROPERTY RIGHTS	☐ 460 Deportation			
& Enforcement of Judgment			40 R.R. & Truck	☐ 820 Copyrights	☐ 470 Racketeer Influenced and			
☐ 151 Medicare Act ☐ 152 Recovery of Defaulted	☐ 330 Federal Employers' Injury Product Liability Liability		50 Airline Regs.	■ 830 Patent ■ 840 Trademark	Corrupt Organizations 480 Consumer Credit			
Student Loans	Liability Liability 340 Marine PERSONAL PROPER		660 Occupational Safety/Health	540 Trademark	480 Consumer Credit 490 Cable/Sat TV			
(Excl. Veterans)	☐ 345 Marine Product ☐ 370 Other Fraud		690 Other		☐ 810 Selective Service			
☐ 153 Recovery of Overpayment	Liability 371 Truth in Lending		LABOR	SOCIAL SECURITY	☐ 850 Securities/Commodities/			
of Veteran's Benefits 160 Stockholders' Suits	□ 350 Motor Vehicle □ 380 Other Personal □ 355 Motor Vehicle Property Damage		'10 Fair Labor Standards Act	☐ 861 HIA (1395ff) ☐ 862 Black Lung (923)	Exchange 875 Customer Challenge			
☐ 190 Other Contract	Product Liability		20 Labor/Mgmt. Relations	☐ 863 DIWC/DIWW (405(g))	12 USC 3410			
☐ 195 Contract Product Liability	☐ 360 Other Personal Product Liability		30 Labor/Mgmt.Reporting	☐ 864 SSID Title XVI	☐ 890 Other Statutory Actions			
196 Franchise	Injury		& Disclosure Act	□ 865 RSI (405(g))	□ 891 Agricultural Acts			
REAL PROPERTY 210 Land Condemnation	CIVIL RIGHTS PRISONER PETITION □ 441 Voting □ 510 Motions to Vacat		40 Railway Labor Act 90 Other Labor Litigation	FEDERAL TAX SUITS 870 Taxes (U.S. Plaintiff	□ 892 Economic Stabilization Act□ 893 Environmental Matters			
220 Foreclosure	☐ 442 Employment Sentence		91 Empl. Ret. Inc.	or Defendant)	☐ 894 Energy Allocation Act			
230 Rent Lease & Ejectment	☐ 443 Housing/ Habeas Corpus:		Security Act	☐ 871 IRS—Third Party	☐ 895 Freedom of Information			
240 Torts to Land	Accommodations 530 General			26 USC 7609	Act			
245 Tort Product Liability290 All Other Real Property	☐ 444 Welfare ☐ 535 Death Penalty ☐ 540 Mandamus & Ott	har			☐ 900Appeal of Fee Determination Under Equal Access			
250 7th Other Real Floperty	Employment	iici			to Justice			
	☐ 446 Amer. w/Disabilities - ☐ 555 Prison Condition				☐ 950 Constitutionality of			
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V. ORIGIN (Place	an "X" in One Box Only)				Appeal to District			
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VI. CAUSE OF ACTION	I Brief description of cause.		I 11.114 IIC D. 4 4	N. 5 000 000 7 122	924 7 222 979 7 (20 5(5			
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VII. REQUESTED IN	☐ CHECK IF THIS IS A CLASS ACTION	N D	EMAND \$	CHECK YES only	if demanded in complaint:			
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VIII. RELATED CASE(S)								
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